(5)
Court, U.S.
JAN 11 1993

No. 92-744

In the Supreme Court of the United States

OCTOBER TERM, 1992

KRAFT, INC.,

Petitioner

v.

FEDERAL TRADE COMMISSION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

CALVIN J. COLLIER
J. EDWARD THOMPSON
Kraft General Foods, Inc.
Three Lakes Drive
Northfield, IL 60093
(708) 646-4431

KENNETH S. GELLER*
ANDREW J. PINCUS
MICHAEL A. VATIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0613

**Counsel of Record*

TABLE OF CONTENTS

Page

I. THE SEVENTH CIRCUIT'S REFUSAL TO APPLY INDEPENDENT REVIEW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS 1

II. THE FTC'S RELIANCE ON ITS OWN REACTION TO KRAFT'S ADS TO FIND THAT THE ADS WERE IMPLICITLY MISLEADING WARRANTS THIS COURT'S REVIEW 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases:

A Quaker Action Group v. *Hickel*, 421 F.2d 1111 (D.C. Cir. 1969) 7

American Home Products Corp. v. *Johnson & Johnson*, 654 F. Supp. 568 (S.D.N.Y. 1987) 9

Better Business Bureau, Inc. v. *Medical Directors, Inc.*, 681 F.2d 397 (5th Cir. 1982) 9

Bose Corp. v. *Consumers Union*, 466 U.S. 485 (1984) . . *passim*

Braun v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), petition for cert. filed, No. 92-817 (Nov. 10, 1992) 5, 6

Don's Porta Signs, Inc. v. *City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988) 4, 5, 6

Dunagin v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259 (1984) 4, 5

FEC v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985) 7

FTC v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965) 7

Freedman v. *Maryland*, 380 U.S. 51 (1965) 7

Hess v. *Indiana*, 414 U.S. 105 (1973) 3

Johnson & Johnson v. *GAC Int'l, Inc.*, 862 F.2d 975 (2d Cir. 1988) 9

TABLE OF AUTHORITIES - Continued

Page

Lindsay v. *City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988) 4, 5

Lindsay v. *City of San Antonio*, No. SA-86-CA-636 (W.D. Tex. Aug. 13, 1986) 4

Miller v. *California*, 413 U.S. 15 (1973) 3

NBC, Inc. v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1974), cert. denied, 424 U.S. 910 (1976) 7

In re Peel, 534 N.E.2d 980 (Ill. 1989) 2

Peel v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990) 1, 2, 3, 7

Porter v. *Califano*, 592 F.2d 770 (5th Cir. 1979) 7

Puerto Rico Tele-Com, Inc. v. *Ocasio Rodriguez*, 747 F. Supp. 836 (D.P.R. 1990) 7

Rankin v. *McPherson*, 483 U.S. 378 (1987) 2, 3-4

Street v. *New York*, 394 U.S. 576 (1969) 3

Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 9

Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) 10

TABLE OF AUTHORITIES - Continued

Page

Miscellaneous

Gallo, *False and Comparative Advertising Under Section 43(a) of the Lanham Trademark Act*, 8 COMM. & L. 3 (1986) 9

Kent, *The "Kraft" Case: Symbol of FTC Activity*, N.Y. L.J., June 21, 1991, at 3 9

Preston, *False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REP. 508 (1989) 9

Janet D. Steiger, Chairman, FTC, Remarks Before the American Advertising Fed'n Gov't Relations Conf. (Mar. 12, 1991) 8

Yao & Van Anh Vecchi, *Information and Decisionmaking at the Federal Trade Commission*, 11 J. PUB. POL'Y & MKTG. 1 (Fall 1992) 8

I. THE SEVENTH CIRCUIT'S REFUSAL TO APPLY INDEPENDENT REVIEW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

As we explained in the Petition, certiorari is warranted to review the Seventh Circuit's decision that the "independent review" standard does not apply to commercial speech cases. That decision directly conflicts with the decisions of the Fifth and Eleventh Circuits and is starkly inconsistent with this Court's statements in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990).

A. The Commission first contends (Br. 12-15) that neither *Bose* nor *Peel* mandates the application of independent review in commercial speech cases. This contention is beside the point. We have never maintained that *Bose* or *Peel* definitively settled the issue. Indeed, it is the very lack of a dispositive statement from this Court that has led to the division in the circuits and that warrants granting certiorari in this case.

Still, *Bose* and *Peel* do strongly indicate that independent review is required in commercial speech cases. The Commission's assertion (Br. 13) that *Bose* actually suggests the opposite is based on a clear misreading of that case. *Bose* does *not* suggest that independent review is unnecessary in commercial speech cases because truthful commercial speech is less susceptible to chilling than other forms of speech. Rather, *Bose* mentions the diminished danger of a chilling effect only to explain why *false* commercial speech in general constitutes an unprotected category of speech. 466 U.S. at 504 n.22. The context of the Court's discussion of commercial speech strongly indicates that independent review is necessary to determine whether *particular* commercial speech falls within that unprotected category -- *i.e.*, whether it actually is false or misleading. *Ibid.* See Pet. 15.[1]

---

[1] Indeed, this reading of *Bose* is bolstered by the Court's treatment of the other category of "unprotected" speech mentioned in footnote 22 of the Court's opinion -- "[s]tatements made by public employees in their

(continued...)

The Commission also mischaracterizes this Court's decision in *Peel*. While not disputing that *Peel* was a commercial speech case, the Commission contends (Br. 14, 19 n.14) that the Court applied *de novo* review only to the factfinders' *legal* conclusion that the attorney's advertisement was misleading, and not to any *factual* findings of actual deception. In fact, although the Court noted that neither the state agency nor the state supreme court had made any factual findings of "actual deception," the Court simply meant that there was no evidence that "any potential client or person was actually misled or deceived" by the advertisement. 496 U.S. at 100-101 (plurality opinion); *id.* at 111-112 (Marshall, J., concurring). The state agency and court nonetheless found that the ad was misleading because they thought consumers might derive false implications from it, see *In re Peel*, 534 N.E.2d 980, 984, 986 (Ill. 1989), and this Court subjected that finding to *de novo* review. 496 U.S. at 101-108 (plurality opinion).[2] Whether that finding was one of "law" or of "fact," it was precisely analogous to the FTC's findings about Kraft's ads in this case.

The Commission also argues more broadly (Br. 19-20) that *Bose* and *Peel* require independent review only of the "ultimate"

---

[1] (...continued)
employment capacity and not touching on matters of public concern." 466 U.S. at 504 n.22. In *Rankin* v. *McPherson*, 483 U.S. 378 (1987), the Court, citing *Bose*, held that independent review was required to determine whether a public employee's statements dealt with a matter of public concern. *Id.* at 386 & n.9. It is evident, then, that the *Bose* footnote listed categories of speech that warranted independent review.

[2] Although neither Justice Marshall's nor Justice White's separate opinion cited *Bose*, it is evident that each Justice also engaged in independent review of the record to determine whether the ad made misleading implied claims. See, *e.g.*, 496 U.S. at 112-113 (Marshall, J., concurring in the judgment) (finding that the ad was potentially misleading because the reference to the "National Board of Trial Advocacy" could falsely imply that the NBTA was a government agency or sanctioned by the states); *id.* at 118 (White, J., dissenting) (agreeing with Justice Marshall's findings but disagreeing as to proper remedy). Even the Seventh Circuit acknowledged that Justice Marshall, as well as the plurality, engaged in independent review in *Peel*. Pet. App. 8a.

question whether an ad is deceptive (which the Commission calls a question of "constitutional fact[ ]"), and not of the "subsidiary" question whether the ad makes a particular misleading claim (which the Commission calls "a question of pure or historical fact"). This argument is completely nonsensical. The question whether an ad makes a particular misleading claim is inseparable from -- and, indeed, determinative of -- the question whether the ad is deceptive and therefore unprotected by the First Amendment.[3] Whether an ad makes an alleged misleading claim is therefore precisely the sort of question that requires independent review under this Court's precedents.[4]

Moreover, even if the question whether an ad makes a particular misleading claim were somehow "subsidiary" to the question whether the ad is deceptive, this Court's precedents indicate that this question is still subject to independent review. Thus, in *Rankin* v. *McPherson*, 483 U.S. 378 (1987), the Court

---

[3] This is especially true where, as here, both parties agree that the alleged claim, if made, is false, and disagree only as to whether the ad actually makes that claim. Indeed, the Commission acknowledges that the question whether an ad makes the alleged misleading claim is determinative of First Amendment protection when it states (Br. 21) that independent review of the ultimate conclusion of deceptiveness would be an "empty formality" if a reviewing court deferred to the finding that the ad makes an alleged claim. For this reason, the Commission's suggestion (Br. 16-17 n.11) that the question presented here is somehow broader than the argument we made in the court of appeals is plainly incorrect.

[4] See, *e.g.*, *Rankin*, 483 U.S. at 385-387 (examining independently whether public employee's remarks dealt with matter of public concern); *Peel*, 496 U.S. at 101-108 (plurality opinion) (whether attorney's advertisement conveyed misleading implications); *Bose*, 466 U.S. at 511-514 (whether defendant in libel case acted with "actual malice"); *Hess* v. *Indiana*, 414 U.S. 105, 108-109 (1973) (per curiam) (whether advocacy was directed to inciting imminent lawless action); *Miller* v. *California*, 413 U.S. 15, 25, 30 (1973) (whether sexually explicit material appealed to "prurient interest" and was "patently offensive"); *Street* v. *New York*, 394 U.S. 576, 592 (1969) (whether remarks were "so inherently inflammatory" as to be "'likely to provoke the average person to retaliation'") (citation omitted).

stated that "any factual findings subsumed in the 'public concern' determination are subject to constitutional fact review." *Id.* at 385 n.8. Similarly, in *Bose*, the Court held that all factual findings "which relate to the actual-malice determination must be independently assessed." 466 U.S. at 514 n.31. In this case, then, any factual findings that relate to the question whether the ads were deceptive -- including the FTC's finding that the ads made the alleged claims -- must be subject to independent review.

B. Despite the Commission's misreading of those cases, then, *Bose* and *Peel* strongly suggest that independent review applies to commercial speech cases. But because neither case definitively resolved the issue, the courts of appeals have reached conflicting conclusions. See Pet. 13-14. Only a dispositive statement from this Court will dispel the confusion in the lower courts.

The FTC seeks (Br. 16-18) to refute the existence of a circuit split by distinguishing the decisions of the Fifth and Eleventh Circuits. These purported distinctions, however, are either inaccurate or irrelevant. Thus, the Commission contends (Br. 16) that *Lindsay* v. *City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988), was not a commercial speech case because the city's ban on portable signs affected commercial and non-commercial speech equally. But it is clear that the ban principally affected commercial speech. See, *e.g.*, 821 F.2d at 1111 & n.15 (noting that "other modes of advertising" were available to persons who relied on portable signs and that city ordinance contained special exemptions for non-commercial speech); *Lindsay* v. *City of San Antonio*, No. SA-86-CA-636, slip op. at 3 (W.D. Tex. Aug. 13, 1986) ("[p]laintiffs contend that the portable sign ordinance violates the First Amendment by unduly prohibiting commercial speech").[5]

Moreover, in deciding to apply independent review, the court in *Lindsay* relied on its earlier decision in *Dunagin* v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259

---

[5] See also *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (citing *Lindsay* as support for application of independent review to commercial speech cases), cert. denied, 485 U.S. 981 (1988).

(1984), a "pure" commercial speech case involving a state's restrictions on liquor advertising. See *Lindsay*, 821 F.2d at 1108 & n.8. In *Dunagin*, the court independently examined the district court's factual findings in determining whether the restriction on commercial speech was justified. 718 F.2d at 749 n.8. *Lindsay* and *Dunagin* thus plainly demonstrate that the Fifth Circuit applies independent review in commercial speech cases.

The Commission admits that *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988), was a commercial speech case, but argues (Br. 16-17) that the Eleventh Circuit applied the *Bose* standard only to "mixed questions of law and fact" that involved "ultimate constitutional questions" -- whether the commercial speech regulation directly advanced the government's goals or was more extensive than necessary -- rather than to "subsidiary factual issues." Even if the Commission's characterization of the issue in *Don's Porta Signs* were accurate, however, it does not distinguish that case from this one in any relevant way. As discussed above (at page 3), the FTC's finding that Kraft's ads conveyed misleading implications is not a "subsidiary" finding, but is completely determinative of whether the ads were deceptive and therefore unprotected by the First Amendment.

In any event, the court in *Don's Porta Signs* explicitly stated that it "must make an independent examination of the *whole record*" in determining whether the regulation of commercial speech directly advanced the government's goals or was more extensive than necessary. 829 F.2d at 1053-54 n.9 (citing *Bose*, 466 U.S. at 499; *Lindsay*, 821 F.2d at 1107; and *Dunagin*, 718 F.2d at 748 n.8) (emphasis added). Thus, the court's determination of whether the regulation directly advanced the government's goals necessarily entailed independent review of all relevant factual findings in the record. See *id.* at 1053.

Finally, the Eleventh Circuit's decision in *Braun* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), petition for cert. filed, No. 92-817 (Nov. 10, 1992), also clearly involved commercial speech -- a magazine advertisement for personal services by a "gun for hire." *Id.* at 1117. The court in *Braun* "subject[ed] to independent examination the jury's finding that [the]

ad, on its face, would convey to a reasonably prudent publisher that it created a clearly identifiable unreasonable risk that the advertiser was available to commit serious violent crimes." *Id.* at 1121.[6] The jury's finding in *Braun* was directly analogous to the FTC's finding at issue here in that both depended on analysis of the language of the advertisement to determine how a reader would interpret it. *Ibid.*

The Commission nevertheless argues (Br. 18) that *Braun* was somehow different because of the identity of the defendant. It characterizes *Braun* as standing for the narrow proposition that independent review applies only where the defendant is the *publisher* that conveyed the commercial speech rather than the advertiser himself.

This argument is preposterous. Nowhere in *Braun* did the Eleventh Circuit hold that independent review is limited to suits against a publisher of commercial speech. To the contrary, the court stated broadly that "the Supreme Court has held that, in cases involving First Amendment claims, an appellate court must undertake independent review of the record 'in order to make sure that "the [trial court's] judgment does not constitute a forbidden intrusion on the field of free expression."'" 968 F.2d at 1120 (citing *Bose*, 466 U.S. at 499, and *Don's Porta Signs*, 829 F.2d at 1053 n.9). Thus, both *Don's Porta Signs* and *Braun* make clear that the Eleventh Circuit applies independent review in commercial speech cases.

C. Finally, the Commission asserts (Br. 15 & n.9) that even if independent review applies to commercial speech cases, it should not apply to the FTC because of the Commission's "expertise" at determining when an ad is "deceptive." But the Commission utterly fails to explain why its determinations should be exempt from the First Amendment's requirement of independent review when the findings of other "expert" bodies do not enjoy such an

---

[6] The Commission's contention (Br. 18 n.13) that the court in *Braun* "applied *de novo* review only to the ultimate question whether the publisher owed a legal duty under state law to the plaintiffs" is thus plainly incorrect.

exemption.[7] Instead, the Commission simply cites (Br. 15) this Court's statement in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), that the Commission "is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the [FTC] Act." But as we noted in the Petition (at page 17 n.7), *Colgate-Palmolive* was decided before the Court extended First Amendment protection to commercial speech, and also before *Bose* and *Peel*. That decision therefore cannot possibly stand for the proposition that the FTC is immune from the type of independent review that other administrative bodies, as well as courts, receive under the First Amendment. Certiorari should therefore be granted to determine the appropriate standard of review for FTC decisions that restrict commercial speech.

II. THE FTC'S RELIANCE ON ITS OWN REACTION TO KRAFT'S ADS TO FIND THAT THE ADS WERE IMPLICITLY MISLEADING WARRANTS THIS COURT'S REVIEW

Certiorari should also be granted to determine whether the FTC Act permits the Commission to find that an expressly truthful

---

[7] See, *e.g.*, *Peel*, 496 U.S. at 108 (plurality opinion) (determination by state bar commission and state supreme court that attorney's letterhead was misleading subject to independent judicial review); *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985) (congressional determination that restrictions on campaign spending were necessary to prevent corruption or appearance of corruption); *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (determination by state agency responsible for regulating motion picture films that particular film was unprotected by the First Amendment); *NBC, Inc.* v. *FCC*, 516 F.2d 1101, 1122 (D.C. Cir. 1974) (FCC conclusion that broadcaster violated "fairness doctrine"), cert. denied, 424 U.S. 910 (1976); *A Quaker Action Group* v. *Hickel*, 421 F.2d 1111, 1117-18 (D.C. Cir. 1969) (Department of Interior's determination that demonstrations near White House posed danger to President); *Porter* v. *Califano*, 592 F.2d 770, 776-780 & n.15 (5th Cir. 1979) (determination by Department of HEW that an employee's speech was false and disrupted the agency's operations). See also *Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriguez*, 747 F. Supp. 836, 843 (D.P.R. 1990) (determination by territory's Department of Consumer Affairs that advertisement was misleading). See Pet. 15-16, 18.

advertisement is implicitly misleading based solely on its own reaction to the ad. The Commission's claim (Br. 21-22) that this case does not even provide an occasion to address this issue is absurd. The FTC's decision itself stated that it was based on the Commission's own reading of "the ads themselves," and that "resort to extrinsic evidence" was "unnecessary." Pet. App. 45a. See also *id.* at 50a, 51a.[8] The Seventh Circuit also stated that "[t]he Commission based all of these findings on its own impression of the advertisements and found it unnecessary to resort to extrinsic evidence." *Id.* at 6a. And, since the FTC's decision, two members of the Commission have publicly acknowledged that the Commission's decision did not rely on extrinsic evidence.[9] Now that its refusal to rely on extrinsic evidence is challenged before this Court, the Commission cannot suddenly claim that it *did* in fact rely on such evidence.

Similarly, the Commission's assertion (Br. 23 & n.18) that its practice under the FTC Act does not conflict with the practice of courts under the Lanham Act is plainly wrong. As the numerous cases and other authorities cited in the Petition (at pages 21-22) show, courts in Lanham Act cases almost universally require extrinsic evidence that consumers perceive the misleading claim allegedly implied by an ad. Indeed, the Seventh Circuit itself acknowledged that "[w]ere this a Lanham Act case, a reviewing

---

[8] Although the Commission also noted that the weight of the extrinsic evidence was "consistent" with its determination, it is clear that the extrinsic evidence was not a basis for the Commission's decision. The Commission did not suggest that it considered this evidence sufficient to prove that the ads were misleading. Indeed, the Commission noted that its extrinsic evidence was flawed, and held that this evidence was only "of *some* probative value." *Id.* at 47a & n.13 (emphasis added).

[9] See Yao & Van Anh Vecchi, *Information and Decisionmaking at the Federal Trade Commission*, 11 J. PUB. POL'Y & MKTG., 1, 3 (Fall 1992) ("[t]he Commission simply examined the ad[s] and concluded that" they made the alleged claims, "without resort[ing] to extrinsic evidence"); Janet D. Steiger, Chairman, FTC, Remarks Before the American Advertising Fed'n Gov't Relations Conf. (Mar. 12, 1991) at 4 ("the Commission determined that it did not need to rely on extrinsic evidence to interpret" the ads).

court in all likelihood would have relied on extrinsic evidence of consumer perceptions." Pet. App. 12a. See also Gallo, *False and Comparative Advertising Under Section 43(a) of the Lanham Trademark Act*, 8 COMM. & L. 3, 24 (1986); Kent, *The "Kraft" Case: Symbol of FTC Activity*, N.Y. L.J., June 21, 1991, at 3.[10] For the reasons discussed in the Petition (at pages 22-24), the Commission's purported "expertise" does not justify the divergence between the Commission's practice under the FTC Act and courts' interpretation of the Lanham Act.

Finally, the Commission disputes (Br. 24) that its practice of relying on its own reading of ads will chill truthful, nonmisleading advertising, citing this Court's suggestion that regulation of false advertising normally poses only a minimal danger of such a chilling effect. But the notion that commercial speech is less susceptible to a chill from government regulation is premised on the assumption that advertisers can more easily distinguish between true and false claims than, for example, reporters or political commentators, and thus can make only true claims without fear of liability. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976). But this assumption is valid only if advertisers actually know what claims their ads will be perceived as making. The problem with the Commission's approach to finding implied claims is that it makes it virtually

---

[10] The three Lanham Act cases cited by the Commission (Br. 23 n.17) do not prove otherwise. *Johnson & Johnson* v. *GAC Int'l, Inc.*, 862 F.2d 975, 980 (2d Cir. 1988), involved a claim that the court found "facially false" -- *i.e.*, *expressly* misleading. The false claim in *Better Business Bureau, Inc.* v. *Medical Directors, Inc.*, 681 F.2d 397, 403 (5th Cir. 1982), while arguably implied, was inextricably tied to a false claim *expressly* made by the ad; it was not derived from expressly truthful statements. And although the court in *American Home Products Corp.* v. *Johnson & Johnson*, 654 F. Supp. 568, 583 (S.D.N.Y. 1987), did find an implied claim without relying on extrinsic evidence, that decision is clearly inconsistent with the Second Circuit's settled rule that courts must require extrinsic evidence in such cases, and probably would not have withstood challenge on appeal. See Preston, *False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REP. 508, 528 (1989).

impossible for advertisers to predict whether a particular ad will be interpreted by the Commission as conveying misleading implications. As the *amicus* brief of the American Association of Advertising Agencies, Inc., *et al.*, confirms and as the Seventh Circuit itself recognized (Pet. App. 16a, 27a-28a), advertisers faced with this uncertainty will be discouraged from making truthful factual statements about their products or services for fear that the Commission will perceive some misleading implication in those statements. The threat of discouraging such important information provides a compelling reason why the FTC Act should be interpreted as requiring objective, extrinsic evidence of such claims.[11]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

CALVIN J. COLLIER
J. EDWARD THOMPSON
Kraft General Foods, Inc.
Three Lakes Drive
Northfield, IL 60093
(708) 646-4431

KENNETH S. GELLER*
ANDREW J. PINCUS
MICHAEL A. VATIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0613

**Counsel of Record*

January 1993

---

[11] The Commission insists (Br. 25) that *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), establishes that the First Amendment does not require the use of extrinsic evidence to prove the existence of implied claims. As we noted in the Petition (at page 26), however, *Zauderer* said nothing about whether the *FTC Act* requires such evidence; it was not even an FTC Act case. Moreover, the ad in *Zauderer* was misleading on its face, in contrast to the facially truthful ads involved here. See Pet. 26-27.